



January 26, 2000

Ms. J. Middlebrooks
Assistant City Attorney
Criminal Law and Police Division
City of Dallas
2014 Main, Room 501
Dallas, Texas 75201

OR2000-0247

Dear Ms. Middlebrooks:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID # 131535.

The Dallas Police Department (the “department”) received a request for information relating to a specified internal affairs investigation. You inform this office that information relating to an earlier stage of the same investigation was the subject of a prior ruling by this office.¹ You state that the department will release all of the information that it previously made public in accordance with our prior decision. You further inform us that the department’s investigation is now complete, so that the records responsive to the instant request for information include the findings of the department’s Internal Affairs Division. You claim that information not previously released is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and have reviewed the information you submitted.

Section 552.103 of the Government Code, as amended by the Seventy-sixth Legislature, provides in relevant part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person’s office or employment, is or may be a party.

¹We have reviewed our prior decision in Open Records Letter Ruling No. 99-3309 (1999).

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103. To sustain a claim under section 552.103, a governmental body must establish: (1) that litigation is either pending or reasonably anticipated, and (2) that the information in question relates to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App. – Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App. – Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990). The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986). To establish that litigation is reasonably anticipated, a governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *Id.* Among other examples, this office has concluded that litigation was reasonably anticipated where the opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); (2) hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and (3) threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981). In support of your claim under section 552.103, you state that the officer who was the subject of the investigation has notified the department of her intent to appeal its outcome. However, you have not provided any other documentation of any pending or prospective litigation to which section 552.103 might be applicable.² Additionally, the submitted records reflect that most if not all of the requested information has been disclosed to the officer whose conduct was investigated. Information that has been made available to the adverse party in anticipated litigation generally may not be withheld pursuant to section 552.103. *See* Open Records Decision Nos. 551 (1990); 454 (1986). In light of these considerations, we conclude that the department may not withhold the information in question from public disclosure under section 552.103 of the Government Code.

As our previous ruling reflects, the investigation that is the subject of the instant request involves alleged sexual harassment. In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App. – El

²We also note that “litigation,” for the purposes of section 552.103, does not necessarily encompass every adversarial or other disputed matter in which a governmental body may become involved. *See generally* Open Records Decision No. 588 (1991).

Paso 1992, writ denied), the court of appeals applied the common law privacy principles discussed in *Industrial Foundation v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977), to an investigation of allegations of sexual harassment. The investigation files in *Ellen* contained third-party witness statements, an affidavit in which the individual accused of the misconduct responded to the allegations, and the conclusions of the board of inquiry that conducted the investigation. *Ellen*, 840 S.W.2d at 525. The court of appeals upheld the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the disclosure of such documents sufficiently served the public's interest in the matter. *Id.* The *Ellen* court also held, however, that "the public does not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.* Based on *Ellen*, this office has held that a governmental body must withhold both the identities of victims and witnesses of alleged sexual harassment and any information that would tend to identify such a victim or witness. See Open Records Decision Nos. 393 (1983), 339 (1982). In this instance, we believe that the findings and conclusions of the internal affairs division and the accused officer's written response are analogous to the documents whose release was ordered in *Ellen* and that the release of these documents will sufficiently satisfy the legitimate public interest in the matter. The rest of the responsive report is not subject to disclosure. We also note that the identities of witnesses other than the person accused and of victims of the alleged harassment, and any information that would tend to reveal their identities, are protected by the common law right of privacy and must be redacted from the information that is released. The identity of the accused is not protected, as the common law right of privacy does not protect information about a public employee's alleged misconduct on the job or complaints made about the employee's performance. See Open Records Decision Nos. 438 (1986), 230 (1979), 219 (1978).

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

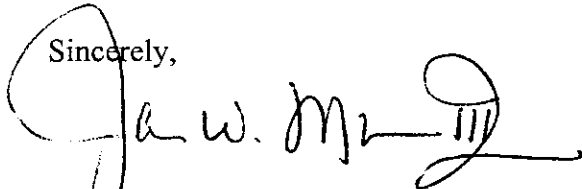
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "J. W. Morris, III". The signature is fluid and cursive, with a large initial "J" and a stylized "M" at the end.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/ch

Ref: ID# 131535

Encl. Submitted documents

cc: Mr. Dave Michaels
Dallas Morning News
Communications Center
Dallas, Texas 75265
(w/o enclosures)